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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

STEPHEN WOLK and HELEN J. WOLK,

Petitioners,

v.

ORANGE COUNTY, FLORIDA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. ARE SECTIONS 162.07 AND 162.09, FLORIDA STATUTES (AND THEIR PROGENY OF LOCAL GOVERNMENT ORDINANCES PATTERNED AFTER THEM SUCH AS SECTION 11-35 AND 11-37, ORANGE COUNTY CODE), UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, FOR PURPORTING TO PROVIDE THAT ADMINISTRATIVE FINES FOR ALLEGEDLY HAVING FAILED TO COMPLY WITH AN ORDER OF A CODE ENFORCEMENT BOARD MAY BE IMPOSED ON A RESPONDENT PROPERTY OWNER AND A LIEN FOR SAME IMPOSED ON THAT OWNER'S PROPERTY WITHOUT NOTICE TO THE PROPERTY OWNER AND HEARING, BASED SOLELY ON THE EX PARTE AFFIDAVITS OF CODE INSPECTORS?

2. DO THE ALLEGATIONS OF THE COMPLAINT IN THE INSTANT ACTION THAT THE CODE ENFORCEMENT BOARD OF ORANGE COUNTY, FLORIDA, IMPOSED A FINE FOR ALLEGED CODE ENFORCEMENT VIOLATIONS ON THE PETITIONERS AND IMPOSED A LIEN FOR SAME ON ALL OF THEIR PROPERTY BY THE PROCEDURE ESTABLISHED IN SECTIONS 162.07 AND 162.09, FLORIDA STATUTES (AND SECTION 11-35 AND 11-37, ORANGE COUNTY CODE) WITHOUT NOTICE TO THE PETITIONERS AND HEARING ADEQUATELY STATE A VIOLATION OF A CONSTITUTIONAL RIGHT OF THE PETITIONERS SUFFICIENT TO ESTABLISH THE "VIOLATION OF A CONSTITUTIONAL RIGHT"

ELEMENT OF A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983?

3. DO THE ALLEGATIONS OF THE COMPLAINT IN THE INSTANT ACTION THAT CODE ENFORCEMENT INSPECTORS OF ORANGE COUNTY, FLORIDA, ACTING IN THAT CAPACITY, REFUSED TO ACKNOWLEDGE THE PETITIONERS' COMPLIANCE WITH AN ORDER OF THE CODE ENFORCEMENT BOARD OF ORANGE COUNTY, FLORIDA, AND FILED A FALSE AFFIDAVIT WITH THAT BOARD STATING THAT THE PETITIONERS HAD NOT COMPLIED WITH THAT ORDER SO AS TO CAUSE A FALSE JUDGMENT AND LIEN FOR CODE ENFORCEMENT FINES TO BE ENTERED AGAINST THE PETITIONERS ADEQUATELY STATE A VIOLATION OF A CONSTITUTIONAL RIGHT OF THE PETITIONERS SUFFICIENT TO ESTABLISH THE "VIOLATION OF A CONSTITUTIONAL RIGHT" ELEMENT OF A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983?

LIST OF ALL PARTIES IN LOWER COURT

A list of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed herein, listed alphabetically, is as follows:

Terry W. Boston;

Beverly M. Boyer;

Mark A. Chernega;

George L. Dorsett;

State of Florida (as *amicus curiae*);

Edward J. Fox, Jr.;

Edward A. Frenk;

Joel D. Hammock;

Ronald Hill;

W. Robert Humble;

Mary Kaschai;

Daniel F. Martzaris;

Orange County, Florida;

Orange County, Florida Code Enforcement Board;

Joseph Perkins;

Melvin Pittman;

Jim Powers;

Marlene Reilly (as Personal Representative of the Estate of Joseph James Reilly);

W. Steven Rodgers;

Helen J. Wolk;

Stephen Wolk;

Jimmy Wrye; and

Fran H. Wyatt;

A corporate disclosure statement is not required herein per Rule 29.6 of the Rules of the Supreme Court of the United States[1] because there is no petitioner herein that is a nongovernmental corporation.

[1] All references to rules in this petition are to the Rules of the Supreme Court of the United States, and therefore will be made hereinafter by reference to the number of the rule only, *e.g.*, "Rule 29.6".

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OPINIONS BELOW

The United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit advise that none of the orders entered relative to the instant case was submitted for publication at either the district court or circuit court level. Apparently, everything that was done by either of these courts with regard to this matter was done by non-published opinions, and therefore there are no citations of official or unofficial reports of the opinions and orders entered by the lower courts herein.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its order sought to be reviewed herein on November 18, 2003 (Appendix A). This order affirmed per curiam, and thus adopted and ratified, the more expansive order of the United States District Court for the Middle District of Florida entered on December 5, 2002 upholding the constitutionality of the statutory and ordinance provisions at issue and dismissing the petitioners' case for failure to state a cause of action under 42 U.S.C. §1983. (Appendix B). Petitioners timely filed a Petition for Rehearing by the Court En Banc which was denied by the United States Court of Appeals for the Eleventh Circuit on February 10, 2004. (Appendix C). The jurisdiction of this Court to review the order here sought to be reviewed by writ of certiorari is invoked pursuant to 28 U.S.C. §1254(1).

28 U.S.C §2403(b) may apply to this proceeding. The United States District Court for the Middle District of Florida, pursuant to 28 U.S.C. §2403(b), certified to the Attorney General of the State of Florida the fact that the constitutionality of a statute of the State of Florida was drawn into question. Petitioners have notified the Attorney General of the State of Florida of this fact as required by Rule 29.4(c).

CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS

United States Constitution, Amendment V, in pertinent part:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1, in pertinent part:

> Section. 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes Sections 162.06, 162.07, and 162.09, in pertinent parts:

> **162.06 Enforcement procedure.-**
>
> (1) It shall be the duty of the code inspector to initiate enforcement proceedings of the various codes; however, no member of a board shall have the power to initiate such enforcement proceedings.
>
> (2) Except as provided in sub-sections (3) and (4), if a violation of the codes is found, the code inspector shall notify the violator and give him or her a reasonable time to correct the violation. Should the violation continue

beyond the time specified for correction, the code inspector shall notify an enforcement board and request a hearing. ...

162.07 Conduct of hearing.-

(3) An enforcement board shall proceed to hear the cases on the agenda for that day. ...

(4) At the conclusion of the hearing, the enforcement board shall issue findings of fact, based on evidence of record and conclusions of law, and shall issue an order affording the proper relief consistent with powers granted herein. ... The order may include a notice that it must be complied with by a specified date and that a fine may be imposed and, under §162.09(1), the cost of repairs may be included along with the fine if the order is not complied with by said date. ...

162.09 Administrative fines; costs of repair; liens.-

(1) An enforcement board, upon notification by the code inspector that an order of the enforcement board has not been complied with by the set time ..., may order the violator to pay a fine in an amount specified in this section for each day the violation continues past the date set by the enforcement board for compliance .... If a finding of a violation ... has been made as provided in this part, a hearing shall not be necessary for issuance of the order imposing the fine. If, after due notice and hearing, a code enforcement board finds a violation to be irreparable or irreversible in nature, it may

order the violator to pay a fine as specified in paragraph (2)(a).

(2)(a) A fine imposed pursuant to this section shall not exceed $250 per day for a first violation and shall not exceed $500 per day for a repeat violation, and, in addition, may include all costs of repairs pursuant to subsection (1). However, if a code enforcement board finds the violation to be irreparable or irreversible in nature, it may impose a fine not to exceed $5,000 per violation.

...

(3) A certified copy of an order imposing a fine may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator ....

Sections 11-34, 11-35, and 11-37 of the ordinances of Orange County, Florida, set forth in Chapter 11 of the Orange County Code, in pertinent parts:

Sec. 11-34. Enforcement procedure.

(a) It shall be the duty of the code inspector to initiate enforcement proceedings of the various codes and ordinances. No member of the code enforcement board shall have the power to initiate such enforcement proceedings.

(b) Except as provided in sub-sections (c) and (d), if a violation of the codes or ordinances is found, the code inspector shall notify the violator and give him or her a reasonable time to correct the violation.

Should the violation continue beyond the time specified for correction, the code inspector shall notify the code enforcement board and request a hearing. ...

Sec. 11-35. Conduct of hearing.

(c) The code enforcement board shall proceed to hear the cases on the agenda for that day....

...

(f) At the conclusion of the hearing, the enforcement board shall issue findings of fact, based on evidence of record and conclusions of law, and shall issue an order affording the proper relief consistent with powers granted by this chapter. ... The order may include a notice that it must be complied with by a specified date and that a fine may be imposed, and under the conditions as specified in section 11-34(d), the cost of repairs may be included along with the fine if the order is not complied with by such date.

Sec. 11-37. Administrative fines; costs of repair; liens.

(a) The code enforcement board, upon notification by the code inspector that an order of the code enforcement board has not been complied with by the set time ..., may order the violator to pay a fine in an amount specified in this section for each day the violation continues past the date set by the code enforcement board for compliance ....
If a finding of a violation ... has been made as provided in this article, a hearing shall not be necessary for issuance of the order imposing

the fine. If, after due notice and hearing, the code enforcement board finds a violation to be irreparable or irreversible in nature, it may order the violator to pay a fine as specified in subsection 11-37(b).

(b) A fine imposed pursuant to this section shall not exceed two hundred fifty dollars ($250.00) per day for a first violation and shall not exceed five hundred dollars ($500.00) per day for a repeat violation and, in addition, may include all costs of repairs pursuant to subsection 11-37(a). However, if the code enforcement board finds the violation to be irreparable or irreversible in nature, it may impose a fine not to exceed five thousand dollars ($5,000) per violation.

...

(c) A certified copy of an order imposing a fine may be recorded in the public records of the county and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator. ....

STATEMENT OF THE CASE

The State of Florida has enacted a procedure by which local governments within the state can enforce codes (building, safety, zoning, etc.) in Chapter 162, Fla. Stat.[1], and provided that units of local government within the state may adopt that procedure for code enforcement within their jurisdictions. §162.03(1), FS. Respondent ORANGE COUNTY, FLORIDA (hereinafter, "the COUNTY") has adopted the procedure set forth in that chapter in its code

[1] Hereinafter, citations to the Florida Statutes will be designated by a section mark and number and the abbreviation "FS", *e.g.*, "§162.09, FS".

enforcement ordinance, Chapter 11 of the Orange County Code[2], §11-27, OCC, the procedures of which are drawn from and are almost identical to those of the State statute.

Essentially, the referenced statute and ordinance establish a scheme for code enforcement in which, after an observed violation of a code has gone uncorrected for an initial warning period, the code inspector noting the violation calls for a hearing before the Code Enforcement Board of the COUNTY (hereinafter, "the CEB")[3] to determine the existence of the violation and to enforce compliance.[4] At this hearing, the CEB typically issues an order finding that the violation asserted by the code inspector exists, setting a date by which the owner of the property must correct the violation, and providing in advance for a fine on the property owner in a specified daily amount, usually the $250.00-a-day maximum, for each day after the date set for compliance until the violation is corrected.[5]

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[2] Hereinafter, citations to the Orange County Code will be designated by a section mark and number and the abbreviation "OCC", *e.g.*, "§11-37, OCC". The provisions of the Orange County ordinance relating to "code enforcement", §11-1, *et seq.*, OCC (hereinafter, "the ordinance"), are drawn from and largely parallel the provisions of the state act, Fla. Stat. §162.01, *et seq.*, (hereinafter, "the statute") (§11-27, OCC). Therefore, hereinafter, the scheme set forth for "code enforcement" in the statute and that set forth in the ordinance will be referred to collectively as "the code enforcement scheme " or "the scheme", and footnotes and parenthetical references following will specify both the provisions of the statute and the ordinance pursuant to which the action alleged could be said to have been taken.

[3] §162.06(2), FS; §11-34(b), OCC.

[4] §162.07, FS; §11-35, OCC.

[5] §162.07(4), FS; §11-35(f), OCC. Since the events of this case, this statute has now been amended to provide, as of October 1, 1999, for a maximum fine of an absurd $1,000.00 a day (§162.09(d), FS), and Orange County has adopted this increased maximum. §11-37(b), OCC, amended per Ord. No. 2002-10 §5, effective August 13, 2002.

This hearing is the last hearing that the property owner gets as of right under the code enforcement scheme. Incredibly, both the statute and the corresponding COUNTY ordinance provide in terms that no hearing is necessary relative to the imposition of fines on the property owner for ostensibly having failed to correct the violation within the time allotted and the imposition of a lien on all of his property for the amount of the fines. §162.09(1), (3), FS, in pertinent part (to the same effect, §11-37(a), (c), OCC):

> (1) An enforcement board, upon notification by the code inspector that an order of the enforcement board has not been complied with by the set time ..., may order the violator to pay a fine in an amount specified in this section [per diem fine of up to $250.00 per day. §162.09(2)(a), FS] for each day the violation continues past the date set by the enforcement board for compliance .... If a finding of a violation ... has been made as provided in this part, *a hearing shall not be necessary for issuance of the order imposing the fine.* ....
>
> ...
>
> (3) A certified copy of an *order imposing a fine may be recorded in the public records* and thereafter shall constitute a *lien against* the land on which the violation exists and upon *any* other real or personal *property owned by the violator.* ...[Emphases added.].

Instead, the critical determination of whether or not such measures as the property owner may have taken as of the expiration of the time for his compliance under the CEB's order have in fact constituted "compliance" with that order, which in turn determines if the property owner is liable for fines, is left to a process of submission of unilateral, ex parte

affidavits by the COUNTY's code inspector. If, as of the expiration of the period for compliance, the inspector feels that the property owner has (in the vernacular of the COUNTY) "achieved compliance", in theory, the code inspector is supposed to give the owner an "affidavit of compliance" acknowledging his compliance with the CEB's order, but there is no compulsory process provided in the scheme by which the owner can compel the inspector to give him this affidavit, regardless of what the owner may have done to the property. If, on the other hand, as of the expiration of the period for compliance, the inspector feels that the property owner has not achieved compliance (or if, as alleged in the instant case, he just does not for reasons of his own want to give the affidavit of compliance to the property owner), the inspector files a conclusory affidavit stating only that the owner has not complied with the CEB's order, termed an "affidavit of non-compliance"[6], with the CEB.[7]

Immediately upon receipt of the affidavit from the inspector stating that the owner has not complied with its order, with no further inquiry into the accuracy of the inspector's conclusions contained in the affidavit, the CEB

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[6] *See, e.g.*, "Exhibit I" to complaint (R1-10-Ex. I (Throughout this petition, petitioners will avail themselves of the license granted in Rule 12.7 to cite to the lower court record although not yet transmitted to this Court. Citations to the lower court record herein are made with reference to the docket sheet for this case as developed by the United States District Court for the Middle District of Florida and consist of a sequence of three or four numbers or groups of numbers separated by hyphens wherein the first, preceded by "R", refers to the volume of the record in which the cited material is found, the second refers to the document number assigned by the court to the document in which the cited material is found, the third refers to the page number or numbers of that document on which the cited material is found, and the fourth, if there is one, wherein the number(s) are preceded by the "¶" symbol, refers to the number(s) of the paragraphs of that document on the pages referenced in which the cited material appears.)).

[7] §162.09(1), FS; §11-37(a), OCC.

summarily issues an order imposing a fine on the owner in the full amount of the daily fine specified in the initial order multiplied by the number of days that have elapsed since the deadline for compliance set in the order, and causes this order to be recorded in the public records.[8] After its recordation, the order creates a lien for the full amount of the fines indicated to be owed thereby that attaches to all property of the owner, real and personal, and which, after three months from the date of its recordation, can be foreclosed by the COUNTY against any or all such property.[9] At no point under the scheme, either before or after the order imposing the fines issues or is recorded as a lien against his property, is the property owner afforded a hearing, or even any means of communicating with the CEB, as to either the propriety of the inspector's conclusions stated in the affidavit of non-compliance, or even whether he is actually guilty of the offense for which the fines are ostensibly imposed.

In summer 1996, a dispute arose between petitioners and a fire inspector for the COUNTY named TERRY BOSTON (hereinafter, "BOSTON") as to the requirements of the fire code relative to an apartment property that the petitioners owned ("the building") that resulted in ill will between BOSTON and the petitioners (R1-10-11-¶19).[10] Acting under the code enforcement scheme, on August 8, 1996, BOSTON called in agencies of the State and the electrical department of the COUNTY in order to cite additional "code violations" in the building (R1-10-11, 12-¶20). On August 9, 1996, two COUNTY electrical inspectors, JOSEPH . JAMES REILLY (hereinafter, "REILLY") and EDWARD A. FRENK (hereinafter,

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[8] §162.09(1), FS; §11-37(a), OCC.

[9] §162.09 (3), FS; §11-37(c), OCC.

[10] Following each fact stated herein is a citation in parenthesis in the manner described in footnote 7, *supra*, to the allegation of the same matter in petitioners' original amended complaint hereinafter mentioned.

"FRENK"), issued a citation against the plaintiffs for alleged violations of the electrical code in the building (R1-10-12-¶22).

On November 20, 1996, REILLY obtained from the CEB, at a hearing pursuant to §11-35, OCC (§162.07, FS), that he had initiated, an order requiring the petitioners to correct the alleged violations of the electrical code in the property by December 4, 1996, and providing for a fine of $250.00 a day for each day after that date that the violations remained uncorrected if they failed to do so (hereinafter, "the CEB's order"; R1-10-13-¶¶24, 25, 26, 27). The petitioners through a contractor caused the work required by the CEB's order to be done by the December 4, 1996 deadline (R1-10-14-¶29). REILLY and FRENK, however, refused to acknowledge this and issue an affidavit of compliance relative to the work on three separate occasions – on December 4, 1996 (R1-10-15-¶30), December 9, 1996 (R1-10-15-¶35), and January 13, 1997 (R1-10-16-¶40) – and instead on those occasions issued additional citations requiring additional work that they purported needed to be done in order to satisfy the CEB's order (R1-10-15-17-¶¶30, 31, 32, 33, 35, 36, 37, 38, 40, 41, 42, 43, 44). On the last of these occasions on January 13, 1997, the citation that REILLY issued included a requirement of work that was clearly outside the scope of the work that the CEB had ordered – that the petitioners replace all of the electrical panels in the building – as a condition of obtaining an affidavit of compliance from REILLY (R1-10-17-¶44). Because of the inclusion of the requirement of work that was clearly extraneous to the work required in the order that the CEB had issued, the petitioners refused to comply with this citation (R1-10-17-¶45).

On February 7, 1997, REILLY filed an affidavit with the CEB pursuant to §11-37(a), OCC (§162.09(1), FS), stating conclusorily that "the corrective action ordered by the Board [in the CEB's order] had not been taken" (R1-10-18-¶46). In response to this affidavit, on March 19, 1997, the

CEB issued an order imposing a fine on the plaintiffs of $250.00 a day for each day from December 4, 1996 that "the violation continue[d]"[11] and, on April 7, 1997, caused this order to be recorded in the public records of Orange County, Florida as a lien against the petitioners' property pursuant to §11-37(a), OCC (§162.09(1), FS), by the procedure specified in §11-37 (§162.09, FS), all with no notice to the petitioners or hearing (R1-10-18-¶¶47, 48, 49, 50). Because the scheme provided for no hearing on the propriety of imposing fines based on this affidavit, the petitioners were deprived of any means of showing the CEB that what they had supposedly "not complied with" was far afield from what the CEB had ordered, and was in fact the unilateral and unauthorized creation of the COUNTY's code inspector, REILLY.

There then ensued a period of some seven years dating to the present day wherein the petitioners struggled with the adverse effects of the putative lien for code enforcement fines recorded against their property and suffered financial damage as alleged in the complaint as a result of the impediment to the use of their property posed by the apparent lien (R1-10-35-¶91(c), (d)). During this period, their efforts to have the situation rectified were met by either studied indifference or a rush to buttress the position of the code inspectors on the part of REILLY's and FRENK's supervisors (R1-10-20-¶51), the CEB and its counsel, and all others connected with the code enforcement scheme (R1-10-20, 21, 23, 24, 25, 26-¶¶52, 53, 54, 55, 64, 65, 66, 67, 68, 71, 72).

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[11] Although the amount of the fine imposed by this order was not known at the time of its issuance since at that time it it was not known how long it would be that the "violation", in the COUNTY's view, would continue, the amount of the fine claimed by the COUNTY pursuant to this order was ultimately liquidated at $182,000.00 when, on December 3, 1998, a different inspector requiring entirely different work in order to comply with the order pursuant to an entirely different citation issued on June 22, 1998, finally submitted an affidavit attesting to the petitioners' compliance with the order (R1-10-21-¶¶56, 57, 58, 59, 60).

The petitioners filed their original complaint and an amended complaint (R1-10; hereinafter, "the complaint") in the instant case for recovery of damages resulting from violations of their constitutional rights committed by the defendants under color of state law, a declaration that the statutes and ordinances pursuant to which these actions were taken – in particular, Sections 162-07 and 162.09, FS, and Sections 11-35 and 11-37, OCC (hereinafter, collectively, "the provisions") – are unconstitutional, and an injunction against their continued enforcement, brought pursuant to 42 U.S.C §1983, in the United States District Court for the Middle District of Florida (hereinafter, "the District Court") on February 2, 2001 and May 24, 2001, respectively. In addition to the allegations of the specific facts recited above, the complaint alleged a conspiracy on the part of the three code inspectors for the COUNTY – BOSTON, REILLY, and FRENK – to exploit the known procedural defects in the code enforcement scheme to inflict financial damage on the petitioners by contriving the entry and recordation of a false and void judgment of liability for code enforcement fines against them by withholding an affidavit of compliance from the petitioners regardless of what they did. (R1-10-12-¶21). Federal jurisdiction was founded in the District Court based on the existence of federal question(s) pursuant to 28 U.S.C. §§1331 and 1343.

Respondents filed motions to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a cause of action on June 15, 2001 (R2-28) and June 18, 2001 (R2-31), in response to which the petitioners timely filed oppositions. On November 5, 2002, the District Court entered an order dismissing the complaint (R3-68-43) based on findings that the provisions were not unconstitutional and that, therefore, the complaint failed to allege the violation of a constitutional right of the petitioners necessary to support an action under 42 U.S.C. §1983 (R3-68-3, 29; Appendix B). On November 18, 2003, a three-judge panel of The United States Court of Appeals for the Eleventh Circuit (hereinafter,

"the Appellate Court") affirmed this order of the District Court "per curiam", without an opinion (Appendix A). Petitioners timely filed on December 9, 2003 a Petition for Rehearing En Banc relative to this ruling, which was denied by the Appellate Court on February 10, 2004 (Appendix C).

REASONS FOR ALLOWANCE OF WRIT

I. THE INSTANT DECISION HOLDING SECTIONS 162.07 AND 162.09, FLA. STAT. (SECTIONS 11-35 AND 11-37, ORANGE COUNTY CODE) CONSTITUTIONAL CONFLICTS WITH NOT ONE DECISION OF THIS COURT, BUT WITH THE ENTIRE LINE OF THIS COURT'S DECISIONS ON PROCEDURAL DUE PROCESS, AND ALSO WITH THAT OF THE FLORIDA STATE COURT OF LAST RESORT, IN THAT IT SUSTAINS THE DISTRICT COURT IN HOLDING THAT A PROPERTY INTEREST WITHIN THE PROTECTION OF THE FIFTH AND FOURTEENTH AMENDMENTS MAY BE DIVESTED WITH NO NOTICE AND HEARING WHATSOEVER, AND THAT STATUTES AND ORDINANCES PROVIDING FOR SUCH DEPRIVATION BY A PROCESS OF UNILATERAL SUBMISSION OF EX PARTE AFFIDAVITS ARE NOT UNCONSTITUTIONAL.

Perhaps the *sine qua non* of certiorari jurisdiction is the maintenance of uniformity of decisions by preventing the aberrant decision's attaining the status of precedent. *See* considerations governing review on certiorari, Rule 10. This Court has consistently interpreted the Fifth Amendment[12]

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[12] As all references to constitutional amendments in this petition are to the Amendments to the Constitution of the United States, references to the Amendments to the Federal Constitution hereinafter will be made by

guarantee against deprivation of property without due process of law to require, at a minimum, notice and hearing before a property interest within the protection of the Fifth Amendment may be divested, and has consistently struck down state statutes purporting to provide for the deprivation of such interests upon less as violative of the Fourteenth Amendment. *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (A statute or ordinance that purports to permit the deprivation of a property right protected under the constitution upon procedures less stringent than those required by due process is unconstitutional.); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (statutes providing for prejudgment taking of possession of money by wage garnishment without prior notice and hearing unconstitutional); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974) (statutes providing for prejudgment execution of vendor's lien without prior notice and hearing unconstitutional); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (statutes providing for prejudgment taking of possession of property by replevin without prior notice and hearing unconstitutional); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (statutes providing for prejudgment taking of possession of money by wage garnishment without prior notice and hearing unconstitutional). With respect to the hearing that due process requires before government may divest a person of such an interest, since the formulization of the test of the sufficiency of the hearing provided to satisfy the requirements of due process in *Mathews v. Eldridge*, 424 U.S. 319 (1976), while this Court has sanctioned hearings upon written submissions where circumstances dictate, *Mathews*, *supra*, at 347, and post-deprivation hearings where circumstances dictate, *City of Los Angeles v. David*, 538 U.S. ___, 155 L.Ed. 2d 946 at 949 (2003), this Court has never deviated from the position that *some* form of hearing is

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reference to the number of the Amendment only, *e.g.*, "the Fifth Amendment."

required before a person may be deprived of a property interest within constitutional protection. *Goss v. Lopez*, 419 U.S. 565, 579 (1975):

> At the very minimum, therefore, [persons] facing ... interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing. [Emphases theirs.];

Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982):

> As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest. [Citation omitted; emphasis theirs.]

Mathews, *supra*, at 333:

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.

In particular, this Court has consistently held any procedure purporting to substitute, for the hearing otherwise required by procedural due process, a procedure wherein a determination is made based on the submission of ex parte affidavits by one party to a dispute to be inadequate under the *Mathews* analysis. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *Connecticut v. Doehr*, 501 U.S. 1 (1991). In *Good*, it was held that a procedure that allowed the federal government summary seizure of real

property based solely on the ex parte submission of affidavits of drug enforcement agents that probable cause for such seizure existed was unconstitutional as violating the rights of the owner of the property to procedural due process under the *Mathews* analysis. 510 U.S. 43, at 62. In *Doehr*, it was held that a statute that purported to provide for the imposition of an attachment on real property based solely upon the ex parte submission of an affidavit of the plaintiff in a civil action stating that he had good cause to believe that he would prevail in the action was unconstitutional as violating the rights of the owner of the property to procedural due process under the *Mathews* analysis. 501 U.S. 1, at 16. At the heart of both decisions was the acknowledgment that any procedure effected by a document representing one party's one-sided, uncontested version of the facts in question, without allowing the other party to the dispute an opportunity to be heard, inherently gave rise to, under the second element of the *Mathews* analysis – the "risk of an erroneous deprivation under the procedures in place" – a likelihood of error at levels that were prohibitive. In this regard, both decisions quoted the oft-quoted passage from *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-172 (1951), stating:

> The likelihood of error that results illustrates that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights ... [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' [Citation omitted.] *Good*, *supra*, 510 U.S. at 56; *Doehr*, *supra*, 501 U.S. at 13-14.

Similarly, the Supreme Court of Florida has held the practice of determining rights within the protection of the Fifth and Fourteenth Amendments on the basis of the

submission of ex parte affidavits to be constitutionally deficient under the *Mathews* analysis. In *County of Pasco v. Riehl*, 635 So.2d 17 (Fla. 1994), the Florida Supreme Court affirmed and virtually adopted intact a decision of the Court of Appeals sustaining the striking down of an ordinance of Pasco County that allowed a dog to be classified as a "dangerous dog", subject to much greater restrictions in its ownership, upon the filing by any person of an affidavit that he or she had been attacked by the dog. No opportunity was given the dog's owner in the ordinance for a hearing or other input into the classification. In striking this ordinance as unconstitutionally abridging the requirements of procedural due process, the Court of Appeals for the Second District of Florida stated that the determination as to the sufficiency of such hearing as may have been provided to satisfy the requirements of procedural due process required consideration of the three *Matthews* factors, which it quoted in the opinion with citation to the case, but the court then went on to say:

> However, where there is no opportunity for a hearing whatsoever, prior to (or even after) substantial restrictions and penalties are placed upon the owner's use and enjoyment of his property, the statute on its face and in its operation, constitutes an unconstitutional denial of due process." *County of Pasco v. Riehl*, 620 So.2d 229, 231 (Fla. 2nd DCA 1993).

The statutes and ordinances in question, Sections 162.07 and 162.09, FS, and Sections 11-35 and 11-37, OCC, purport to provide for the determination of whether a property owner has timely complied with an order of the CEB, and therefore whether that property owner is liable for administrative fines in often huge amounts, to be made based solely on the unilateral, ex parte affidavits of code inspectors

of the COUNTY. Not only is the property owner not provided a hearing at any point in the code enforcement scheme as to the issue of his compliance with the order or lack thereof, at no point in the scheme is he even afforded a means of communicating with the CEB as to his compliance with their order, either before or after the order imposing fines issues and is recorded as a lien against all his property. §162.09(3), FS; §11-37(c), OCC.

It is established that the right to hold real estate free of the interference posed by encumbrances such as liens is a property right within the protection of the Fifth and Fourteenth Amendments. *Doehr*, *supra*, 501 U.S. at 12:

> ... [O]ur cases show that even the temporary or partial impairments to property rights that attachments, *liens*, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with *liens*, 'are subject to the strictures of due process.' [Emphases added.]

Thus, it becomes apparent that the statutes and ordinances in question purport to provide for nothing less than the deprivation of a property right within the protection of the Constitution, *by their terms* without notice and hearing, on the basis of what? The ex parte submission of affidavits by code inspectors for the COUNTY. These provisions are thus in blatant disregard of the entire line of precedents regarding procedural due process as developed to this point by this Court and concurred by the Florida Supreme Court, and the order(s) here under review sustaining them are in glaring departure from literally the entire body of federal and state law discussed above. Certiorari should therefore be granted to prevent the inconsistency of precedent that would otherwise result.

II. THE SUBJECT DECISION HOLDING THAT THE ALLEGATIONS OF THE INSTANT COMPLAINT THAT THE CEB ENTERED A JUDGMENT OF LIABILITY FOR ADMINISTRATIVE FINES AND RECORDED IT AS A LIEN AGAINST PETITIONERS WITHOUT NOTICE AND HEARING BY THE PROCEDURE ESTABLISHED UNDER SECTIONS 162.07 AND 162.09, FLA. STAT. (SECTIONS 11-35 AND 11-37, ORANGE COUNTY CODE), DID NOT VIOLATE A CONSTITUTIONAL RIGHT OF THE PETITIONERS SUFFICIENT TO SUPPORT A CAUSE OF ACTION UNDER 42 U.S.C §1983 CONFLICTS WITH DECISIONS OF THIS COURT, AND DIRECTLY COUNTERMANDS THE HOLDING OF THE HIGHEST STATE COURT YET TO RULE ON THIS ISSUE.

The order here sought review affirms, and thus adopts and ratifies, the District Court's holding that the allegations of the instant complaint that the CEB entered an order imposing fines on the petitioners and a lien on their property without notice to the petitioners or hearing pursuant to the procedure established in the code enforcement scheme (R1-10-18-¶¶47, 48, 50) do not allege a violation of a constitutional right of the petitioners sufficient to support a cause of action under 42 U.S.C. §1983 (R3-68-3, 29). This holding is in direct conflict with this Court's holding in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988). In *Peralta*, it was held that "... [U]nder our cases, a judgment entered without notice or service is constitutionally infirm", 485 U.S. 80, at 84, and therefore the entry of a judgment without notice and hearing constitutes a violation of procedural due process under the Fifth and Fourteenth Amendments.

Moreover, the subject holding also completely disregards the fact that the highest court of the State of Florida to have ruled on the issue of whether the entry of an

order of liability for fines for code enforcement violations without notice to the respondent and hearing by the procedure specified in §§162.07 and 162.09, FS, violates the constitutional rights of the respondents squarely held that the entry of such an order by these procedures *did* constitute a violation of the constitutional rights of the respondents to procedural due process. *Massey v. Charlotte County*, 842 So.2d 142 (Fla. 2nd DCA 2003). The facts of *Massey* were so similar to those of the instant case as to perhaps justify discussion at some length.

On July 5, 2000, the code enforcement board for Charlotte County, Florida (hereinafter, "the CCCEB") held a hearing under §162.07, FS, at which it found the Masseys to be in violation of the building code. 842 So.2d at 143. This is analogous to the CEB's hearing of November 20, 1996 in the instant case at which the petitioners were found to be in violation of the electrical code (R1-10-13, 14-¶¶26, 28). On July 11, 2000, the CCCEB issued an order pursuant to §162.07(4), FS, holding the Masseys in violation of the building code, requiring them to remedy the violation within 30 days, and providing for a fine on the Masseys of $100.00 per day for each day thereafter that the violation continued if they failed to do so. 842 So.2d at 143-144. This is analogous to the CEB's order of November 20, 1996 in the instant case holding the petitioners in violation of the electrical code, requiring them to remedy the violations within 14 days, and providing for a fine on the petitioners of $250.00 per day for each day thereafter that the violation continued if they failed to do so. (R1-10-14-¶28). On November 13, 2000, a Charlotte County code inspector submitted an "affidavit of non-compliance" averring that the Masseys had not complied with the CCCEB's July 11, 2000 order to the CCCEB pursuant to §162.09(1), FS. 842 So.2d at 144. This is analogous to the February 7, 1997 submission by code inspector REILLY of an "affidavit of non-compliance" in the instant case averring that the petitioners had not complied with the CEB's November 20, 1996 order

(R1-10-18-¶46). On January 4, 2001, the CCCEB entered an order imposing a fine and lien on the Masseys pursuant to §162.09(1), FS, based solely on the affidavit of the code inspector, without notice to the Masseys or hearing. 842 So.2d at 144. This is analogous to the CEB's entry in the instant case of its order of March 19, 1997 imposing a fine and lien on the petitioners based solely on REILLY's affidavit, without notice to the petitioners or hearing. (R1-10-18, 19-¶¶47, 48, 49). As in the instant case (R1-10-13, 14, 15, 16 -¶¶23, 29, 34, 39), in *Massey* the respondents had made some efforts at compliance prior to the entry of the order imposing a fine and lien on them, thus raising an issue as to whether compliance had been achieved. *Id.*

The Masseys appealed the CCCEB's order imposing a fine on them to the state circuit court in which they argued, as do the petitioners in the instant case, that the order was void by virtue of having been entered without notice to them and hearing. *Id.* Upon affirmance of that order by the circuit court, the Masseys petitioned the District Court of Appeals for the Second District of Florida for a writ of certiorari quashing the circuit court's order.

Stating that the issue for decision in the case was "whether additional process was due to the Masseys either before or after the [CCCEB] ordered the imposition of the fines and lien" (842 So.2d at 146), the court of appeals held that the entry by the CCCEB of the order imposing fines and a lien on the Masseys without notice and hearing under the procedure prescribed by §162.09(1), FS, violated the Masseys' constitutional right to procedural due process. 842 So.2d at 147. Central to the court's decision was its finding under the analytical framework of *Mathews v. Eldridge*, *supra*, that nowhere in the entire procedural history of the case developed under the code enforcement scheme of Chapter 162, FS, were the Masseys afforded any opportunity to challenge the CCCEB's findings as to what the court termed the "moderately complex issues" peculiar to the imposition of fines/liens under the code enforcement scheme:

> ... [T]here remains a serious risk of an erroneous deprivation [in entry of the order imposing fines and lien without notice and hearing] because the amount of fines imposed and the propriety of the lien depended upon factual findings that the Masseys were never given an opportunity to protest. These findings involved moderately complex issues, including whether the alleged violation continued, how long it continued, and whether there was any reason to reduce the per diem fine imposed in light of attempts by the Masseys to comply. To remedy the risk of improper seizure, there must be some type of procedure to allow the property owner to address these new findings. [Citing *County of Pasco v. Riehl*, 620 So.2d 229 (Fla. 2d DCA 1993), discussed *supra* at p. 18]. *Id.*

Thus, the Appellate Court's affirmance of the District Court's holding in the instant case that allegations of entry of a judgment and lien for alleged code enforcement fines against the petitioners without notice and hearing did not state the violation of a constitutional right of the petitioners is in conflict with not only decisions of this Court, but with that of a Florida State court directly on point as well.

III. THE SUBJECT DECISION HOLDING THAT THE ALLEGATIONS OF THE COMPLAINT THAT EMPLOYEES OF THE COUNTY ACTING UNDER THE AUSPICES OF AUTHORITY THAT THEY HELD BY VIRTUE OF STATE LAW DID ACTS ILLEGAL UNDER STATE LAW DID NOT STATE A CAUSE OF ACTION UNDER 42 U.S.C §1983 ALSO CONFLICTS WITH DECISIONS OF THIS COURT.

The order here sought review affirms, and thus adopts and ratifies, the District Court's holding that the allegations of the instant complaint fail to allege the violation of a constitutional right of the plaintiffs sufficient to support a cause of action under 42 U.S.C. §1983 on any basis (R3-68-3, 29). This holding is in direct conflict with this Court's holding in *Monroe v. Pape*, 365 U.S. 167 (1961). In *Monroe*, it was established that deprivations actionable under 42 U.S.C. §1983 include those effected by violations by state officials of local law that is constitutional - i.e., by "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law", 365 U.S. 167, at 184, as well as by enforcement of local law that is unconstitutional.

It is axiomatic that in evaluating the sufficiency of a complaint as against a motion to dismiss,

> ... [The] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The complaint in the instant action alleges that the three inspectors of the COUNTY, on several occasions improperly refused to acknowledge the compliance by the petitioners with the CEB's order (R1-10-15, 16-¶¶30, 35, 40), and ultimately filed a false affidavit with the CEB that triggered the entry of the false judgment for code enforcement fines against the petitioners. (R1-10-18-¶46). These are all acts in abuse of the authority that the inspectors held by virtue of state law, and therefore, under *Monroe*, the allegations of these acts in the complaint should have been held sufficient to state a cause of action under 42 U.S.C. §1983, irrespective of whether the provisions of the code enforcement scheme discussed above were constitutional or not.

CONCLUSION

The orders of the Court of Appeals and the District Court conflicting with the great weight of authority on each of the points above, the petitioners respectfully request this Court issue a writ of certiorari to review the order of the Court of Appeals for the Eleventh Circuit affirming the order of the District Court for the Middle District of Florida as to which review is sought herein.

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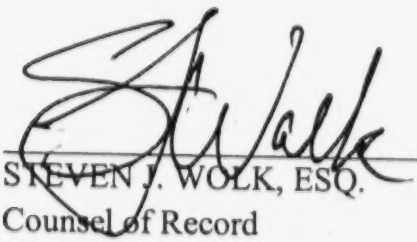
DATED: May 3, 2004

Respectfully submitted,



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APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITES STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 18 2003
THOMAS K. KAHN
CLERK

No. 02-16662

D. C. Docket No. 01-00141-CV-ORL-6-28DAB

STEPHEN WOLK,
HELEN J. WOLK,

Plaintiffs-Appellants,

versus

ORANGE COUNTY, FLORIDA,
a political subdivision of the State of Florida,
TERRY W. BOSTON, individually, et al.,

Defendants-Appellees,

ATTORNEY GENERAL OF FLORIDA,

Intervenor.

Appeal from the United States District Court
for the Middle District ofFlorida

(November 18, 2003)

Before BLACK and HULL, Circuit Judges, and. GOLDBERG*, Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.1[1]

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

[1] 11th Cir.R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on fmdings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B

FILED

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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STEPHEN WOLK and HELEN J. WOLK,

Plaintiffs,

-vs- **Case No. 6:01-cv-141-Orl-28DAB**

ORANGE COUNTY , FLORIDA, et al.,

Defendants.

ORDER

In this action brought pursuant to 42 U.S.C. § 1983, Plaintiffs Stephen and Helen Wolk ("the Wolks") seek relief from various orders entered by the Orange County Code Enforcement Board involving real property owned by the Wolks. The Wolks primarily contend that the statutory and code provisions pursuant to which the orders were entered are unconstitutional on various grounds. The Defendants include Orange County, several individual Orange County officials, an assistant County Attorney, several members of the Code Enforcement Board, and counsel for the Code Enforcement Board.

In their Amended Complaint (Doc. 10), the Wolks allege seven counts: in Count I, the Wolks seek, against all

Defendants, damages under § 1983 for deprivation of civil rights; in Count II, the Wolks seek vacation of allegedly void orders entered by the Code Enforcement Board; in Count III, the Wolks seek injunctive relief and a declaratory judgment that Section 162.09{1), Florida Statutes, and Section 11-37(a) of the Orange County Code are unconstitutional as violative of procedural due process under the Fifth and Fourteenth Amendments; in Count IV, the Wolks seek injunctive relief and a declaratory judgment that Sections 162.07 and 162.09, Florida Statutes, and Sections 11-35 and 11-37 of the Orange County Code are unconstitutional as violative of substantive due process under the Fifth and Fourteenth Amendments; in Count V, the Wolks seek injunctive relief and a declaratory judgment that Sections 162.01-.13, Florida Statutes, are unconstitutional as violative of the rights to trial by jury and to confront witnesses under the Sixth and Fourteenth Amendments; in Count VI, the Wolks seek injunctive relief and a declaratory judgment that Section 162.09{1), Florida Statutes, and Section 11-37{a) of the Orange County Code are unconstitutional as providing for excessive fines in violation of the Eighth and Fourteenth Amendments; and in Count VII, the Wolks seek injunctive relief and a declaratory judgment that Section 162.09{2), Florida Statutes, and Section 11-37{b) of the Orange County Code are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

This cause is currently before the Court on the Motion to Dismiss and Motion to Strike Amended Complaint {Doc. 28) filed by Defendants W. Robert Humble, Joseph Perkins, Ronald Hill, Jimmy Wrye, Mary Kaschai, Fran Wyatt, W. Steven Rodgers, Jim Powers, Beverly Boyer, Joel Hammock, Mark Chernega, Daniel Mantzaris, and Drage, DeBeaubien, Knight, Simmons, Mantzaris & Neal, P.A. {"DDKSMN") (hereinafter collectively "the Code Enforcement Board Defendants), and the Motion to Dismiss Pursuant to Rule 12(b){6) and Rule 8{a), Federal Rules of Civil Procedure (Doc. 31) filed by Defendants Orange County, Terry Boston,

Marlene Reilly, Edward Frenk, Edward Fox, Jr., Melvin Pittman, and George Dorsett (hereinafter "the County Defendants").[1] Upon consideration, and as more specifically set forth below, because the Court finds the code enforcement scheme to be constitutionally sound the Defendants' motions shall be granted and this case shall be dismissed.

I. Motion to Dismiss Standards

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). At the motion-to-dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." Bryant v. Avado Brands. Inc., 187 F.3d 1271, 1273 n.1 (11th Cir.1999) (citing Hawthorne v. Mac Adjustment. Inc., 140 F.3d 1367, 1370 (11th Cir. 1998)). However, "[a]s a general rule, conclusory allegations and unwarranted deductions of fact are not admitted as true in a

[1]In addition to the motions themselves (Docs. 28 & 31), the following record documents relate to these motions: the Orange County Defendants' Memorandum in Support of Motion to Dismiss Pursuant to Rule 12(b)(6) and Rule 8(a), Federal Rules of Civil Procedure (Doc. 32); Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss and to Strike Amended Complaint of the Code Enforcement Board Defendants (Doc. 33); Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss of the Orange County Defendants (Doc. 34); the Orange County Defendants' Responsive Brief to the Court's April 5, 2002 Request Therefor (Doc. 48); the Code Enforcement Board Defendants' Response to Court Order Requesting Additional Briefing (Doc. 50); Attorney General's Memorandum of Law as Amicus Curiae in Support of Constitutionality of Chapter 162, Fla. Stat. (Doc. 47); Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Motions to Dismiss Complaint (Doc. 49); and Defendants' Notice of Filing Supplemental Authority Regarding Constitutionality of Fla. Stat. Chapter 162 (Doc. 60).

motion to dismiss." S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 408 n.10 (11th Cir. 1996) (citing Associated Builders, Inc. v. Ala. Power Co., 505 F.2d 97, 100 (5th Cir. 1974)). In ruling on a motion to dismiss, "'the court limits its consideration to the pleadings and exhibits attached thereto.'" Grossman v. NationsBank, N.A, 225 F.3d 1228, 1231 (11th Cir. 2000) (quoting GSW, Inc. v. Long County, 999 F.2d 1508, 1510 (11th Cir.1993)); see also Brooks v. Blue Cross & Blue Shield of Fla.; Inc., 116 F.3d 1364, 1368 (11th Cir. 1997) ("[T]he analysis of a 12(b)(6) motion is limited primarily to the face of the complaint and attachments thereto.").

II. Factual Allegations of the Amended Complaint

The following facts are taken from the allegations of the Plaintiffs in their Amended Complaint (Doc. 10) and from the attachments thereto. Of course, at this stage of the case, the court makes no findings as to the truth or legitimacy of these allegations.

The Wolks own the "Dubsdread Apartments" (hereinafter "the building" or "the property") at 401 Niblick Avenue, Orlando, within the unincorporated area of Orange County. On August 8, 1996, an argument arose between a fire code inspector, Defendant Terry Boston, and Steven Wolk[2] over the property's compliance with the fire code. The argument culminated in Boston contacting other regutatory agencies for an investigation of other potential violations of the Orange County Code ("OCC").

On August 8 and 9, 1996, Boston allegedly conspired with electrical inspectors - Defendants Joseph Reilly and Edward Frenk - to exploit Orange County's code enforcement scheme to financially harm the Wolks. After causing an initial Code Enforcement Board compliance order to be

[2]Steven Wolk is the counsel of record in this case and is the son of Plaintiffs Stephen and Helen Wolk.

issued against the Wolks,[3] the inspectors allegedly planned to find violations regardless of the Wolks' remedial actions. Thereafter, they would file false affidavits[4] attesting to the Wolks' failure to comply, pursuant to which the Code Enforcement Board would invoke a per diem fine and lien against the property.[5] All of the subsequent acts allegedly done by these Defendants were in furtherance of this plan.

On August 9, 1996, Reilly and Frenk claimed to have found electrical code violations on the property and issued a citation (Doc. 10, Ex. B) (hereinafter "the original citation") requiring correction by August 26, 1996. The Wolks allegedly corrected the violations within the required time frame, but on September 3, 1996, Reilly and Frenk claimed to find the work inadequate. (Doc. 10, Ex. C). On September 24, 1996, Reilly filed a request for a Code Enforcement Board hearing.[6]

After notice was given to the Wolks, the Code Enforcement Board conducted a hearing[7] on November 20, 1996 and entered an order (Doc. 10, Ex. E) (hereinafter the "compliance order") finding that the violations noted in the statement of violation existed at the property. The compliance order required correction by December 4, 1996, and notified the Wolks that failure to cure by that date would result in the imposition of a $250 fine charged each day after December 4 that the violations remained uncorrected. The

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[3]Pursuant to Section 11-35(f), OCC, and Section 162.07(4), Florida Statutes.

[4]Pursuant to Section 11-37(a), OCC, and Section 162.09(1), Florida Statutes.

[5]Pursuant to Section 11-37, OCC, and Section 162.09, Florida Statutes.

[6]Pursuant to Section 11-34(b), OCC, and Section 162.06(2), Florida Statutes.

[7]Pursuant to Section 11-35, OCC, and Section 162.07, Florida Statutes.

compliance order directed the Wolks "to contact the Code Enforcement Officer bringing this violation to arrange for an inspection of the property to verify compliance with this Order." {Doc. 10, Ex. E at 2). The compliance order also indicated that the Code Enforcement Board had found "that the violation presents a serious threat to the public health, safety, and welfare" and that therefore a copy of the order was being sent to Orange County. {Doc. 10, Ex. E at 2).

Through completion of additional work, the Wolks remedied the conditions noted in the compliance order, but on December 4, 1996, Frenk issued another citation {Doc.10, Ex. F) purporting to require completion of additional work as a condition to satisfaction of the compliance order. The Wolks performed the additional work, but on December 9, 1996, Reilly issued another citation {Doc. 10, Ex. G) again purporting to require further work as another condition to the compliance order. The Wolks completed additional work to remedy the conditions noted in the December 9, 1996 citation, but on January 13, 1997, Reilly issued another inspection notice {Doc. 10, Ex. H) listing other violations. including a requirement of replacing all of the building's electrical panels.

On January 15, 1997, the Wolks informed Reilly of their refusal to perform the additional work noted in the January 13 citation. On February 7, 1997, Reilly filed an Affidavit of Non-Compliance[8] {Doc. 10, Ex. I) wherein he stated that the Wolks had attempted but not completed corrective action. Based on Reilly's Affidavit of Non-Compliance, on March 19, 1997 the Code Enforcement Board issued an "Order Imposing Administrative Fine/Lien"[9] (Doc. 10, Ex. J) (hereinafter the "fine/lien imposition order")

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[8]Pursuant to Section 11-37{a), OCC, and Section 162.09{1), Florida Statutes.

[9]Pursuant to Section 11-37(a), OCC, and Section 162.09(1), Florida Statutes.

finding that the Wolks had not complied with the compliance order and imposing a $250 per diem fine beginning December 4, 1996. On April 7, 1997, the Code Enforcement Board filed the fine/lien imposition order in the public records of Orange County, thereby[10] officially placing a lien on the Wolks' property.

On April 11 and 14, 1997, Steven Wolk disclosed the alleged misconduct of Reilly and Frenk to their immediate supervisor, Defendant Edward Fox. Fox stated that he and the County ratified and endorsed the actions of Reilly and Frenk. On April 16, 1997, Steven Wolk brought before the Code Enforcement Board, on the Wolks' behalf, a motion to vacate[11] (Doc. 10, Ex. K) the fine/lien imposition order on grounds that it was fraudulently procured. On the advice of Defendant Mantzaris, the Code Enforcement Board refused to afford the Wolks a hearing on the motion to vacate and dispersed.

At the Wolks' request, on June 22, 1998[12] the County conducted an inspection of the property through electrical inspector Vern Ogden, who is not a defendant in this action. Ogden issued a citation (Doc. 10, Ex. L) setting forth additional work as a condition to the compliance order different from that designated by Reilly and Frenk and minus the electrical panel replacement requirement. After the Wolks performed his cited additional work, Ogden filed an Affidavit of Compliance with the Code Enforcement Board on December 3, 1998 documenting the Wolks' satisfaction of the compliance order.

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[10]Pursuant to Section 11-37(c), OCC, and Section 162.09(3), Florida Statutes.

[11]The motion to vacate had previously been served on each Code Enforcement Board member, Code Enforcement Board attorney Daniel Mantzaris, DDKSMN, and Assistant County Attorney George Dorsett.

[12]The Complaint does not describe any events between April 16, 1997 and June 22 1998.

The County calculated the $250 per diem fine from December 4, 1996, to December 3, 1998, and it totalled $182,000. On January 20, 1999, another owner of the property, Gina Wolk, brought before the Code Enforcement Board a motion to reduce the fine. On that date, the Code Enforcement Board held a hearing on the motion to reduce the fine and issued an order (Doc. 10, Ex. M) (hereinafter the "fine reduction order") reducing the fine from $182,000 to $100,000. In making its determination, the Code Enforcement Board heard allegedly "unsworn, false testimony" from Defendant Assistant County Attorney George Dorsett that the County had spent $182,000 on the subject enforcement case. (Doc. 10 at 23).

The Wolks filed a motion to vacate (Doc. 10, Ex. N) both the fine/lien imposition order and the fine reduction order, and the Code Enforcement Board convened for a hearing on March 15 and April 19, 2000 to consider that motion. The motion alleged that the fine/lien imposition order was void because it had been entered in spite of a failure to satisfy the notice and hearing requirements of due process. At the hearing on the motion to vacate, Dorsett argued on behalf of Orange County that the Code Enforcement Board's November 20, 1996 hearing satisfied the due process notice and hearing requirements for issuance of the fine/lien imposition order. The Code Enforcement Board followed Defendant Mantzaris's legal advice to deny the motion to vacate.

The Wolks appealed the January 1999 fine reduction order to the state circuit court for Florida's Ninth Judicial Circuit. On January 8, 2001, the circuit court entered an order (Doc. 10, Ex. O} finding the $100,000 fine to be excessive. That order states in part:

> At the hearing on [Gina Wolk's motion to reduce the fine], the Board, Mr. Dorsett, Ms. Wolk and her attorney discussed the past difficulties with Appellants in completing the

> corrections. There was also a general consensus that Mr. Wolk had made this entire case more difficult than it had to be and that he failed to cooperate. The Board considered the expense incurred by the county , including attorney's fees, as well as the rents earned by Appellants while the property was not in compliance. Ms. Wolk asked the Board to disregard her co-owners' prior conduct and rely on her representations that she would work with the County and that she would make every effort to remain in compliance. Ms. Wolk also asked the Board to consider the fact that it might end up managing the property itself if it did not work with her. The Board granted Ms. Wolk's request but only reduced the fine by $82,000.00. The $250.00 per day fine imposed upon Petitioners, that mushroomed into a $182,000.00 fine, was excessive and confiscatory. The Court finds, based upon the record presented, that a reduction of that fine by only $82,000.00 was an abuse of discretion.

(Doc. 10, Ex. O at 3) (footnote omitted). The-circuit court remanded the matter to the Code Enforcement Board to further consider reduction of the fine. (Doc. 10, Ex. 0 at 4).

On February 21, 2001, the Code Enforcement Board held a hearing to reconsider the motion to reduce the fine pursuant to the circuit court's direction. During that hearing, the Wolks renewed their April 1997 motion to vacate and argued that the Board's orders had been entered without due process. On March 1, 2001, the Board issued an order (Doc. 10, Ex. P) reducing the-fine to $10,000 as well as an order (Doc. 10, Ex. Q) denying the Wolks' motion to vacate the fine/lien imposition order.

Based on these allegations, the Wolks filed the present action as well as a parallel action in state court, which has been stayed.

III. Analysis

Each of the motions of the two groups of Defendants raise several arguments for dismissal, some of which overlap.[13] The contentions raised can be combined and reduced to five arguments, each of which will be addressed in turn. First, the Defendants contend this case should be dismissed in deference to a pending action in Florida state

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[13]In their motion (Doc. 28), the Code Enforcement Board Defendants first argue that they enjoy either absolute or qualified immunity from the Wolks' suit. Second, they contend that the Wolks' suit is barred by Florida's bar and merger rules as well as by the Wolks' failure to make a Jennings reservation. Third, these Defendants assert that the Wolks have failed to exhaust their state court remedies. Fourth, Defendants Mantzaris and DDKSMN argue that the Amended Complaint fails to state a cause of action against them because they were acting within their role as attorneys at times relevant to the Amended Complaint. Fifth, the Code Enforcement Board Defendants contend that the Amended Complaint fails to state a cause of action because the statutory provisions at issue are constitutionally sound and provide due process. Finally, these Defendants move to strike the Wolks' claim for punitive damages based on section 768.72, Florida Statutes.

In their motion to dismiss and supporting memorandum (Docs. 31 and 32), the County Defendants contend that the first, third, fourth, fifth, sixth, and seventh causes of action in the Amended Complaint are time-barred. Second, they aver that the claims against Defendants Boston, Reilly, Frenk, Fox, Pittman, and Dorsett in their individual capacities should be dismissed based on qualified immunity or other defenses. Third, these Defendants argue that the Amended Complaint fails to state a cause of action for a violation of 42 U.S.C. §1983 because the Wolks have failed to set forth a right of which they have been deprived. Fourth, the Orange County Defendants argue that the Amended Complaint fails to state a cause of action because the statutory provisions at issue are constitutionally sound and provide due process. Fifth, these Defendants contend that this Court should dismiss this action in favor of a state court action filed by the Wolks. Finally, these Defendants argue that the Wolks' claims for punitive damages should be dismissed pursuant to section 768.72, Florida Statutes.

court. Second, the Defendants argue that the statutory and code provisions at issue are facially constitutional. Although the Court finds this second argument dispositive, the Court will also address the Defendants' contentions that the Amended Complaint fails to state a § 1983 claim and that they are entitled to absolute or qualified immunity. Fourth, Defendants aver that the Wolks' claims are barred by the statute of limitations. Lastly, the Defendants argue that the Wolks' claims for punitive damages should be dismissed.

A. Motion to Dismiss in Deference to a Pending State Court Action

The Orange County Defendants ask this court to dismiss the present action filed on February 2, 2001 in deference to an almost identical action brought by the Wolks four days later in Florida state court, which has been stayed. In considering this issue, the court applies the principles set forth by the Supreme Court in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), and Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983). See also TranSouth Fin. Corp. v. Bell, 149 F.3d 1292 (11th Cir. 1998); First Franklin Fin. Corp. v. McCollum, 144 F.3d 1362 (11th Cir. 1998); Am. Bankers Ins. Co. of Fla. v. First State Ins. Co., 891 F.2d 882 (11th Cir. 1990); Noonan South, Inc. v. County of Volusia, 841 F.2d 380 (11th Cir. 1988).

In Colorado River, the Supreme Court held that a federal court may dismiss an action because of parallel state court litigation in exceptional circumstances, noting:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a

> controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."

424 U.S. at 813 (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)). The Colorado River decision provided four factors to consider in determining whether exceptional circumstances exist: 1) whether one of the courts has assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the potential for piecemeal litigation; and 4) the order in which the forums obtained jurisdiction. Id. at 818. In Moses H. Cone, the Supreme Court repeated these four factors and added two more: 5) whether state or federal law will be applied; and 6) the adequacy of the state court to protect the parties' rights. Moses H. Cone, 460 U.S. at 23, 26. The Moses H. Cone Court also noted that "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." Id. at 16. Applying the principles set forth in Colorado River and Moses H. Cone to the facts of the present action, dismissal is not warranted.

The first Colorado River factor weighs in favor of dismissal because the Wolks have placed $10,000 in the registry of the state court. This factor, however, is entitled to minimal weight in the overall balancing of factors.

With respect to the second factor - relating to inconvenience of the federal forum - the federal district court is no less convenient than Florida's Ninth Judicial.Circuit. In fact, the state and federal courts are in proximity, located only a few blocks apart. The individual parties and witnesses are employed in Orange County and are located in Orange

County. Therefore, this factor does not tip the balance toward dismissal of this federal action.

The third factor requires consideration as to whether piecemeal litigation may be circumvented by dismissing the federal action. Because the state action has been stayed pending this court's ruling on the motions to dismiss, piecemeal litigation is not a threat. Furthermore, Defendants have failed to demonstrate how jurisdiction of the federal court would result in piecemeal litigation. Therefore, this factor does not weigh in favor of dismissal.

The fourth factor addresses "the order in which jurisdiction was obtained by the concurrent forums." Colorado River, 424 U.S. at 818. Despite the language originally used to describe this factor in Colorado River, the Moses H. Cone decision clarified that this factor does not turn on which action was filed first, but is measured "in terms of how much progress has been made in the two actions." Moses H. Cone, 460 U.S. at 21. The facts before this court indicate that there has been relatively little progress in either forum, though substantive motions to dismiss have been filed in this court. Therefore, this factor also does not weigh in favor of dismissal.

The fifth factor is an evaluation of whether state or federal law will be applied. Although the Amended Complaint includes allegations against Orange County and members of the Orange County Code Enforcement Board, this action primarily seeks to redress alleged violations of the Wolks' rights secured by the United States Constitution. Therefore, this factor weighs against dismissal. See Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp., 878 F.2d 1360, 1373 (11th Cir.1989) (taking into account that federal civil rights law would govern adjudication of discriminatory zoning claim in reversing district court order dismissing claim pursuant to Colorado River doctrine).

With respect to the sixth and final factor, Defendants advance no reason to question the Florida court's ability to protect the Wolks' rights as they relate to this action. Indeed,

both state and federal courts are able to protect Plaintiffs' rights. Thus, this factor does not weigh in favor of dismissal.

In sum, although some of the Colorado River factors weigh slightly in favor of deference to the state court case, balancing these six factors does not present exceptional circumstances warranting a dismissal or stay of this federal action. Accordingly, the Orange County Defendants' motion to dismiss the present case in deference to the state court action is denied.

B. Facial Constitutionality of the Code Enforcement Scheme

In their Amended Complaint, the Wolks' main contention is that the code enforcement scheme contained in chapter 162 of the Florida Statutes and Chapter 11 of the Orange County Code is unconstitutional on its face because no hearing is required before the Code Enforcement Board enters an order imposing a per diem fine and a lien against the property. The Wolks argue that they were denied procedural due process when the fine/lien imposition order was recorded upon the filing of an "Affidavit of Non-Compliance" by the code inspector without an evidentiary hearing. However, in their motions to dismiss, the Defendants argue that the code enforcement scheme codified in the Orange County Code and the Florida Statutes comports with due process.

i. The Statutory Scheme

The provisions which the Wolks challenge as unconstitutional are contained in Chapter 162 of the Florida Statutes and Chapter 11 of the Orange County Code. Sections 162.01 through 162.13, Florida Statutes, which collectively comprise the "Local Government Code Enforcement Boards Act," ("the Act") and Article II of Chapter 11 of the Orange County Code (OCC) (§§ 11-26 through 11-41, OCC), known as "the 'Orange County Code Enforcement Board Ordinance'" ("the Ordinance") and

enacted pursuant to chapter 162, Florida Statutes, are attached hereto as Appendices.[14]

The Ordinance provides as follows regarding its purpose:

> It is the intent of this article to promote, protect, and improve the health, safety, and welfare of the citizens of the county by creating an administrative board with authority to impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective, and inexpensive method of enforcing any codes and ordinances in force in the county, where pending or repeated violations continue to exist.

§ 11-29, OCC.[15] The enforcement scheme established in the Ordinance provides that if a code violation is found, "the code inspector shall notify the violator and give him or her a reasonable time to correct the violation." § 11-34(b), OCC; §162.06(2), Fla. Stat. If the violation continues past the date set for correction, the inspector then notifies the code enforcement board and requests a hearing. § 11-34(b), OCC; § 162.06(2), Fla. Stat. The code enforcement board schedules a hearing and provides notice thereof to the violator. § 11-34(b), OCC; § 162.06(2), Fla. Stat. At the hearing, the enforcement board takes testimony from the code inspector, the property owner, and witnesses. § 11-35(c), OCC; § 162.07(3), Fla. Stat. Additionally, "[f]ormal rules of evidence shall not apply, but fundamental due

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[14]Citations in this order are to the 1995 version of chapter 162, Florida Statutes, and to the 2002 version of the Orange County Code, which has been provided to the Court.

[15]The parallel statutory provision, Section 162.02, states the same goals as to counties and municipalities.

process shall be observed and shall govern the proceedings." § 11-35(c), OCC; § 162.07(3), Fla. Stat.

After the hearing, the code enforcement board issues findings of fact, conclusions of law, and an order; the order "may include a notice that it must be complied with by a specific date and that a fine may be imposed." § 11-35(f), OCC; § 162.07(4), Fla. Stat. If the code enforcement board receives notification from the code inspector that the order has not been complied with by the specified compliance date, the code enforcement board "may order the violator to pay a fine ... for each day the violation continues past the date set by the code enforcement board for compliance." § 11-37(a), OCC; § 162.09(1), Fla. Stat. "If a finding of a violation or a repeat violation has been made as provided in this article, a hearing shall not be necessary for issuance of the order imposing the fine." § 11-37(a), OCC; § 162.09(1), Fla. Stat. Moreover, "[a] certified copy of an order imposing a fine may be recorded in the public records of the county and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator." § 11-37(c), OCC; § 162.09(3), Fla. Stat.

An order imposing a fine may, upon petition to a state circuit court, "be enforced in the same manner as a court judgment." § 11-37(c), OCC; § 162.09(3), Fla. Stat. The fine "continue[s] to accrue until the violator comes into compliance or until the judgment is rendered to foreclose on a lien filed pursuant to this section, whichever occurs first." § 11-37(c), OCC; § 162.09(3), Fla. Stat. Final administrative orders of code enforcement boards are appealable to the circuit court. § 11-40, OCC; § 162.11, Fla. Stat. Such appeals are not de novo hearings but are "limited to appellate review of the record created before the code enforcement board." § 11-40, OCC; § 162.11, Fla. Stat.

ii. Analysis

In analyzing whether Orange County's code

enforcement scheme violates procedural due process, this court is guided by the Supreme Court's landmark decision in Mathews v. Eldridge, 424 U .S. 319 (1976). In Mathews, the Court outlined the parameters of procedural due process and explained:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. This court will analyze each of these factors in turn in the context of the Orange County code enforcement scheme.

a. The Private Interest Affected

In the instant case, the private interest at issue is a property interest. Although the recordation of a fine/lien imposition order by a code enforcement board does not effect a total loss of an owner's property, property owners do have an interest in owning and enjoying their property without encumbrances from code violation orders and liens, and such interests have been recognized as entitled to due process protections. In Connecticut v. Doehr, 501 U.S. 1, 12 (1991), the Supreme Court explained:

> [T]he Court has never held that only ... extreme deprivations trigger due process

> concern. See Buchanan v. Warley, 245 U.S. 60, 74, 38 S.Ct. 16, 18, 62 L.Ed. 149 (1917). To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, "are subject to the strictures of due process."

(Quoting Peralta v. Heights Med. .Ctr., Inc., 485 U.S. 80, 85 (1988)). The existence of such an encumbrance could impair the ability of the property owner to sell or engage in other transactions involving the property. For example, in this case the Wolks allege that the encumbrance prevented them from refinancing their property at historically low rates. Cf. Doehr, 501 U.S. at 11 (listing similar adverse consequences impacting owners whose property was subject to prejudgment attachment).

In considering the private interest involved, Mathews instructs that one factor to be examined is "the degree of potential deprivation" that may be effected by a particular decision. The Wolks, and other property owners against whom a code enforcement board order is recorded, face a temporary, partial encumbrance against their property rather than a total loss of ownership rights. Although property interests are implicated by recordation of the fine/lien imposition order, such recordation does not result in a permanent or total loss or impairment of a property right. Cf. Mathews, 424 U.S. at 340 ("Only in Goldberg v. Kelly, 397 U.S. 254 (1970)] has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation.").

The Mathews Court also noted that "the possible length of [the] wrongful deprivation ... is (also) an important factor in assessing the impact of official action on private interests.'" 424 U.S. at 341 (quoting Fusari v. Steinberg, 419

U.S. 379, 389 (1975). In the circumstances of the instant case, the encumbrance remains on the property until the violations of the electrical code are remedied by the property owner. Thus, although the length of the deprivation is uncertain, it is also to a large extent within the control of the property owner. Although the deprivation could be somewhat lengthy, as in Mathews "there is less reason here than in Goldberg to depart from the ordinary principle, established by [Supreme Court] decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." Mathews, 424 U.S. at 343; see also Doehr, 501 U.S. at 12 (noting, en route to concluding that attachment statute impacted a property interest, that "the State correctly points out that [the effects of the attachment] do not amount to a complete, physical, or permanent deprivation of real property [and that] their impact is less than the perhaps temporary total deprivation of household goods or wages").

Moreover, under the code enforcement scheme a property owner can eventually obtain nearly complete retroactive relief from a fine/lien imposition order. Through a motion to the code enforcement board or an appeal, the encumbrance on the property can be removed and the fine vacated or reduced. For example, in the instant case notwithstanding the allegations they now make, the Wolks were able to obtain an Affidavit of Compliance in December 1998, and they also ultimately succeeded at having the fine reduced from $182,000 to $10,000. These remedies reflect the temporary and partial nature of the impairment of interest at issue here.

b. The Risk of Erroneous Deprivation and the Probable Value of Addition or Substitute Procedural Safegauards

The second Mathews factor to be considered is the risk of an erroneous deprivation and the probable value of additional or substitute procedural safeguards. In the context

of the code enforcement scheme at issue here, both the existing risk and the potential value of additional measures are quite small.

Under the Orange County code enforcement scheme, the alleged violator is first given a violation notice by an inspector and an opportunity to cure the violation. If the violator does not remedy the deficiencies, the inspector notifies the Code Enforcement Board and the matter is scheduled for a hearing at which the alleged violator can present evidence. After that hearing, the Board issues an order setting forth findings of fact as to the existence of violations and informing the property owner that if the deficiencies are not cured by a certain date a lien and a per diem fine will be imposed from that date until correction. The lien and fine are then imposed pursuant to an "Affidavit of Non-Compliance" filed by the code inspector, and the pertinent code provisions state that "a hearing shall not be necessary for issuance of the order imposing the fine." §162.09(1), Fla. Stat; § 11-37(a), OCC.

The risk of an erroneous imposition of a fine/lien under the code enforcement scheme is extremely low. The property owner having been afforded an opportunity to contest the alleged violations at a hearing and the violations having been found as a fact by the board, the act of the code inspector in rechecking the property for compliance is merely ministerial - the violations either have or have not been remedied. Compliance with the electrical code does not turn on credibility assessments, and a local government inspector is generally a trained professional who aims to proficiently serve the public. The odds are slim that the inspector would have a motive to submit a false affidavit of noncompliance or, as alleged here, execute a personal vendetta against the property owner. The risk of an erroneous deprivation is indeed minuscule.[16]

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[16]The smallness of the risk of error is evidenced by the use by the Wolks' counsel during oral argument of an example of the code

Turning to the probable value of additional procedures, the Wolks' suggestion of a second hearing appears unnecessary and even unworkable. Because of the cut-and-dried nature of the inquiry involved here, a hearing would be of little benefit. The issue of electrical code compliance is easily ascertainable and easily established by documentation - for example, by affidavit of an inspector, property owner, or hired electrician. The question of code compliance is even more straightforward than the disability determination at issue in Mathews, which "turn[s], in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists, '" 424 U.S. at 344 (quoting Richardson v. Perales, 402 U.S. 389, 404 (1971)), and is highly distinguishable from the situation involving the private tort plaintiff's case in Doehr. See also Mitchell v. W.T. Grant Co., 416 U.S. 600, 609 (1974) (finding that issues of "existence of the debt, the lien, and the delinquency" are "ordinarily uncomplicated matters that lend themselves to documentary proof"). And, as discussed below, a property owner is not precluded from submitting documentary evidence regarding compliance either pre- or post-deprivation; hence, little value would be added by imposing a hearing requirement prior to issuance of the fine/lien imposition order. As the Mathews Court noted, "To be sure, credibility and veracity may be a factor ... in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in

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inspector being "a madman" and refusing to issue an affidavit of compliance because of his insanity. The fact that an erroneous affidavit would conceivably be filed only in the circumstance of an insane inspector or a personal vendetta as aileged in this case buttresses the conclusion that the code enforcement scheme on its face is not constitutionally infirm.

Goldberg." 424 U.S. at 344-45. Again, here even more so than in Mathews, the pertinent inquiry does not turn on credibility determinations and little would be gained by an evidentiary hearing.

In considering the probable value of additional safeguards, the abundant safeguards already present in the code enforcement scheme should be emphasized. The property owner is given numerous notices of the violation and an opportunity to cure before an evidentiary hearing is held. After the hearing, the owner has the opportunity to appeal the determination that the violations in fact exist. Compliance or lack of compliance after the hearing is a straightforward matter which, "as applied to the generality of cases, not the rare exceptions," Mathews, 424 U.S. at 344, will correctly be determined by the code inspector. And, in cases where an incorrect determination is made, the property owner may file a motion or an appeal, or both, related to that determination. Thus, even in the event of an incorrect determination regarding cure the property owner is not without a remedy under the . existing scheme, and imposing a requirement of a hearing each time an Affidavit of Non-Compliance is filed would not significantly improve the process.

c. The Government's Interest

The final Mathews factor to be considered is the interest of the government, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews, 424 U.S. at 335. In the instant case, the county's interest is in protecting the safety and welfare of the public from hazardous electrical conditions. Unquestionably, this is a significant interest and one that is not antithetical to the Wolks' interests as property owners and landlords.

Moreover, the burdens that additional procedures would entail could be substantial. As discussed during oral argument on the present motions, imposing a hearing

requirement would mean not just one more hearing, but potentially an infinite number of hearings; a hearing would be required again and again, each time a property owner was alleged not to have corrected deficiencies noted in a compliance order. This could result in a very expensive and burdensome system for the county , with - in light of the extremely low risk of an erroneous deprivation discussed above - little, if any, corresponding benefit to the alleged violator or the public. As the Mathews Court explained:

> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefIt of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. ...
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> But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience

> of courts." The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," to insure that they . are given a meaningful opportunity to present their case.

424 U.S. at 348-349 (citations omitted).

The significant governmental and public interest involved here distinguishes the instant case from cases relied upon by the Wolks involving disputes between private parties. For example, in Connecticut v. Doehr, the Court addressed a state statute which permitted a prejudgment attachment based on an affidavit of a private litigant who had filed an unrelated tort suit against the defendant property owner. The Doehr Court specifically stated that "[n]o interest the government may have affects the analysis" and that "the [private] plaintiff's interest is de minimis" on its way to concluding that the procedures of the Connecticut attachment statute did not comport with due process. 501 U.S. at 16. The government interest involved here, along with the disinterested character of the affiant (the inspector), also distinguishes this case from County of Pasco v. Riehl, 635 So.2d 17 (1994), aff'g 620 So.2d 229 (Fla. 2d DCA 1993), in which a Florida "dangerous dog" statute was held unconstitutional where it permitted a dog to be classified as "dangerous" without any hearing based on an affidavit of a person claiming to have been attacked by the dog.

The government's significant, legitimate interest in public safety effectuated through enforcement of its building

codes cannot be gainsaid. As noted in the Act and Ordinance, the purpose of the legislation is to "promote, protect and improve the health, safety, and .welfare" via "an equitable, expeditious, effective, and inexpensive method of [code] enforc[ement]." § 11-29, OCC; § 162.02, Fla. Stat. Through its procedures, and as shown by the relief that the Wolks have already been able to obtain in the instant case through the filing of motions and appeals and the conduct of hearings, the scheme effectuates the stated purpose.

d. Balancing the *Mathews* Factors

In applying the Mathews factors, the court must assess whether the procedural protections warranted by the "particular situation" at hand are provided. The "particular situation" in the instant case involves the imposition of a lien and a per diem fine after numerous notices to and opportunities by the property owner to correct identified and established electrical code violations.

Although the Wolks contend that reliance on the inspector's "Affidavit of Non-Compliance" at the last stage prior to imposition of the lien and fine is improper and renders the code enforcement scheme procedurally deficient, this Court is unpersuaded. On balance, the Court concludes that although property owners undoubtedly have an interest in enjoying their property free of unwarranted encumbrances, because the risk of error and the likely benefit of additional procedures are so low and the interest of the government and the public in ensuring compliance with the electrical code so high, the code enforcement scheme which the Wolks now challenge provides adequate due process protections.

Although the subject provisions do not specifically provide for a hearing after an Affidavit of Non-Compliance is filed by a code inspector, the code enforcement scheme contains numerous procedural protections. First, from the outset the ordinance provides the property owner with numerous opportunities to cure the electrical code violations before the lien and per diem fine are imposed. The property

owner is given notice of the violations and an opportunity to cure. If corrective action is not taken, a hearing is provided. If the code enforcement board finds at the hearing that the alleged violations exist, those findings of fact are reduced to a written order and the property owner is given a certain date by which to correct the deficiencies or face the imposition of a fine or lien. The property owner may appeal the compliance order to the circuit court.[17]

If the property owner fails to remedy the violation, the code inspector files an Affidavit of Non-Compliance, upon which the Code Enforcement Board may then base its order imposing lien/fine. There is no infirmity in the board's reliance on the inspector's affidavit; as noted earlier, the reinspection is simply a ministerial act of checking whether the conditions - as established to exist at the prior hearing - have been alleviated. The inspector is merely entrusted with the task of assessing the property conditions. Moreover, although no hearing is provided for in the scheme prior to the imposition of the order, the property owner is not without an opportunity to object or be heard. For instance, the property owner could (if he is present) certainly make his or her case to the inspector at the time of the reinspection - a reinspection which is conducted at the behest of the owner. Additionally, although no hearing is provided for, the code enforcement scheme does not preclude the presentation and/or filing of written evidence of compliance - for example, an affidavit of an electrician or the property owner himself, or a receipt for services obtained from an electrician - with the code enforcement board. Indeed, in the instant case the Wolks filed a motion to vacate the fine/lien order, and they could have attached whatever supporting evidence they had to that motion. Although the statute and code provide that an appeal to the circuit court of an enforcement board order is not "a

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[17]Apparently the Wolks did not appeal the November 1996 compliance order and do not contest the finding that the violations existed as of that date; they contend only that they corrected the violations some time after that date.

hearing de novo but shall be limited to appellate review of the record before the code enforcement board," § 162.11, Fla. Stat.; § 11-40, OCC, there is no bar to creation of a record through the submission of documentary evidence - evidence well-suited and appropriate to this type of dispute.

Additionally, the Defendants have argued in support of their motions to dismiss that the Wolks had available to them an appeal to the Board of Building Adjustments and Appeals, which is provided for in Chapter Nine of the Orange County Code. At oral argument, the Wolks' response to this contention was that the Board of Building Adjustments and Appeals is not the decisionmaker and that therefore an appeal to that body does not provide due process. However, due process does not require an evidentiary hearing before "the decisionmaker" prior to adverse administrative action in all circumstances. Here, the code enforcement scheme provides for a low-risk assessment of non-compliance by a presumably responsible, disinterested inspector. If the property owner feels that the determination is incorrect or, as alleged here, intentionally false, the property owner has the opportunity to submit evidence and to appeal either to the circuit court or the board of adjustments or appeals, or both.

In sum, the code enforcement scheme at issue in this case provides low-risk, fair procedures prior to the imposition of a temporary , although somewhat indefinite, lien and fine against a code violator's property. As evidenced by the Wolks' own allegations regarding the relief they have obtained through motions, hearings, .and appeals, the code enforcement scheme strikes an appropriate balance between the rights of property owners and the governmental interest in ensuring the safety of the public at low cost to that same public. Thus, the challenged provisions of chapter 162, Florida Statutes, and chapter 11 of the OCC are not unconstitutional as violative of due process.

Although the Wolks' primary argument as to unconstitutionality relates to procedural due process, in their Amended Complaint the Wolks also allege constitutional

infirmities in several statutory and code provisions based on substantive due process, right to jury. trial and to confront witnesses, excessive fines, and equal protection. However, the Court finds no merit to these contentions. First, the due process concerns that the Wolks raise regarding the code enforcement scheme are procedural rather than substantive. See McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994). Second, the Sixth Amendment right to a jury trial and to confront witnesses applies to criminal prosecutions and not to the imposition of civil fines, and the Court rejects the Wolks' contention that the code enforcement scheme is "quasi-criminal and penal." U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... [and] to be confronted with the witnesses against him ...."). Third, section 162.09(1), Florida Statutes, and Section 1137(a), OCC, do not on their face provide for an excessive fine in violation of the Eighth Amendment. Cf. United States v. Fleetwood Enters., Inc., 689 F. Supp. 389, 392 (D. Del. 1988) ("Even if the Court were to assume that the civil penalty in §611 [of the Manufactured Housing Act] falls under the Excessive Fines Clause of the Eighth Amendment, § 611(a) cannot be unconstitutional on its face because it in no way mandates an excessive fine."). Finally, Section 162.09(2), Florida Statutes, and Section 11-37(b), OCC, do not violate equal protection on their face. In sum, the Court finds all of the Wolks' facial unconstitutionality claims to be without merit.

C. § 1983 Claim

In Count I of their Complaint, the Wolks bring a claim against all of the Defendants under 42 U.S.C. § 1983 for denial of procedural due process under the Fifth and Fourteenth Amendments; for denial of substantive due process under the Fifth and Fourteenth Amendments; for denial of the right to trial by jury and the opportunity to

confront witnesses under the Sixth and Fourteenth Amendments; and for subjection to excessive fines under the Eighth and Fourteenth Amendments (Amended Complaint, Doc. 10 ¶ 74). All of these claims are premised on the alleged unconstitutionality of the code enforcement scheme, and in light of the Court's determination above that the pertinent statutory and code provisions are not constitutionally infirm, the § 1983 claim also fails and will bedismissed. Nevertheless, the Court will address the immunity defenses of the Defendants and other alleged grounds for dismissal.

i. Absolute Immunity

1. Absolute Immunity of Assistant County Attorney Dorsett

Even if there were a constitutional flaw in the code enforcement scheme, Assistant County Attorney Dorsett would benefit from absolute immunity from the § 1983 suit. The allegations against Assistant County Attorney Dorsett are based on his representation of the County's position before the Code Enforcement Board in the enforcement proceedings against the Wolks. As explained by the Sixth Circuit court in Cooper v. Parrish, 203 F.3d 937, 947 (6th Cir.), cert. denied, 531 U.S. 877 (2000), absolute immunity has been extended beyond criminal prosecution to civil enforcement actions:

> Although the Supreme Court has yet to address directly whether prosecutors are entitled to absolute immunity when they act as advocates in the course of a civil rather than a criminal action, several other courts of appeals have determined that prosecutors are protected by absolute immunity "when their duties are functionally analogous to those of a prosecutor's, regardless of whether those duties are performed in the course of a civil or

> criminal action." Schrob v. Catterson, 948 F.2d 1402, 1411 (3rd Cir. 1991); see also Mendenhall v. Goldsmith, 59 F.3d 685, 691 (7th Cir.) (explaining that the fact that "the alleged misconduct here arose in the context of a civil proceeding with a law enforcement purpose does not render absolute immunity inappropriate. The essential inquiry is whether [the prosecutor] was functioning in an enforcement role analogous to that of a prosecutor.") (citations and footnote omitted), cert. denied, 516 U.S. 1011, 116 S.Ct. 568, 133 L.Ed.2d 492 (1995). We agree that the prosecutors in this case may still be absolutely immune even though the alleged constitutional violations occurred when the officials were pursuing a civil action. Indeed, as long as the prosecutors were functioning in an enforcement role and acting as advocates for the state in initiating and prosecuting judicial proceedings, they are entitled to an absolute immunity defense.

See also Zar v. S.D. Bd. of Exam'rs of Psychologists, 976 F.2d 459, 466 (8th Cir. 1992) ("[Absolute] immunity applies even to an agency attorney performing the same prosecutorial function within the administrative hearing process."); cf. Gray v. Poole, 243 F.3d 572, 577 {D.C. Cir. 2001) {holding "that govemment attorneys who prosecute child neglect actions perform 'functions analogous to those of a prosecutor [and] should be able to claim absolute immunity with respect to such acts'") {quoting Butz v. Economou, 438 U.S. 478, 515 {1978)). This court finds these decisions well-reasoned and that extension of prosecutorial immunity to civil enforcement proceedings is appropriate. In the instant case, the allegations against Dorsett relate to his role as Assistant County Attorney in the code enforcement proceedings

against the Wolks, and accordingly Dorsett would be entitled to absolute immunity.

2. Absolute Immunity of the Code Enforcement Board Defendants

The members of the Code Enforcement Board argue that they enjoy absolute immunity from the § 1983 suit because the claims arise from these Defendants' legitimate governmental activities as legislators. However, the authorities cited by these Defendants in support of their absolute immunity argument involve legislative activity, which is not at issue here. Although "state and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities," Bogan v. Scott-Harris, 523 U.S. 44, 49 {1998), as correctly noted by the Wolks in their response to the motion {Doc. 33), "[i]n determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity," a "functional approach" is applied "which looks to 'the nature of the function performed, not the identity of the actor who performed it.'" Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993) (quoting Forrester v. White, 484 U.S. 219, 229 (1988)). The absolute immunity of legislators "'extends only to actions taken within the sphere of legitimate legislative activity.'" Woods v. Gamel, 132 F.3d 1417, 1419 (11th Cir. 1998) (citing Brown v. Crawford County, Ga., 960 F.2d 1002, 1011 (11th Cir.1992) (quoting Finch v. City of Vernon, 877 F.2d 1497, 1505 (11th Cir.1989))). Acts are legislative acts when they are "policymaking and of general application." Woods, 132 F.3d at 1420. Here, the alleged actions of the Code Enforcement Board Defendants which form the basis of the Wolks' claims against them were not acts of general application and thus were not of a legislative nature. Consequently, these Defendants would not enjoy

absolute legislative immunity in this case.[18]

ii. Qualified Immunity

The Individual Defendants have moved to dismiss the claims against them on the basis of qualified immunity. In Saucier v. Katz, 533 U.S. 194 (2001), the Supreme Court described the framework for analyzing qualified immunity claims:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right

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[18]Although the Code Enforcement Board Defendants do not benefit from absolute *legislative* immunity in this case, these Defendants might possibly benefit from absolute *judicial* or *quasi-judicial* immunity. Such absolute immunity has been extended to members of some boards serving judicial functions. See, e.g., Dunham v. Wadley, 195 F.3d 1007 (8th Cir. 1999) (concluding that members of veterinary medical examining board enjoyed absolute quasi-judicial immunity); Sultenfuss v. Snow, 894 F.2d 1277, 1278-79 (11th Cir. 1990) (noting that "parole board members are entitled to quasi-judicial immunity from suits requesting damages based upon the decision to grant or withhold parole"). On the other hand, such immunity has been denied to members of other boards. See, e.g., Wood v. Strickland, 420 U.S. 308 (1975) (finding that school board members were entitled to qualified rather than absolute immunity in §1983 action); accord Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499 (11th Cir. 1990). The Defendants have not raised this argument, and in any event, in light of the Court's conclusion that these Defendants benefit from qualified immunity, the Court need not resolve the question of their entitlement to absolute judicial or quasi-judicial immunity.

> is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.
>
> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.
>
> ... "The contours of the right [that the official is alleged to have violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

533 U.S. at 201-02 (citations omitted). Thus, for the individual Defendants claiming a qualified immunity defense, a two-step analysis is required. First, the court must

evaluate whether the alleged conduct of the particular defendant violated a constitutional right. If so, then secondly the court must assess whether that right was clearly established. In considering the qualified immunity defenses raised by the various Defendants in this case, it is helpful to divide the allegations into two categories: 1) allegations against the Code Enforcement Board Defendants and the Assistant County Attorney, who are accused of acting in accordance with the code enforcement scheme; and 2) allegations against the inspectors and county officials related to claims that false citations and affidavits were intentionally produced and filed.

1. Qualified Immunity of the Code Enforcement Board Defendants

Even if this Court had found the code enforcement scheme to be constitutionally deficient, the doctrine of qualified immunity would shield the members of the Code Enforcement Board accused of no more than carrying out their responsibilities under the code and following the letter of the statute and ordinance. It would not be clear to a reasonable Code Enforcement Board member "that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202. Therefore, qualified immunity would be appropriate for all named Code Enforcement Board members - Defendants Humble, Perkins, Hill, Wrye, Kaschai, Wyatt, Rodgers, Powers, Boyer, Hammock, and Chernega.[19]

2. Qualified Immunity Defenses Raised by Orange County Inspectors and Managers

The qualified immunity defense also would be applicable to the remaining individual Orange County

[19]In light of the Court's conclusion that the Code Enforcement Board Defendants would enjoy qualified immunity, the Court does not reach the alternative arguments raised in the motion to dismiss (Doc. 28) filed by these Defendants.

Defendants with respect to allegations based solely on the defendants' execution of their duties in accordance with the constitutionally sound code enforcement scheme. However, the Amended Complaint contains additional allegations - related to conspiracy and the falsification of citations and affidavits - which are more problematic for inspector defendants Boston, Reilly, and Frenk. Applicability of the qualified immunity defense to these defendants must also be analyzed in light of these allegations, and an analysis of the specific allegations against the remaining individually named Orange County officials is warranted.

Defendant inspectors Boston, Reilly, and Frenk are alleged to have conspired in August 1996 to inflict financial harm on the Wolks by exploiting Orange County's code enforcement scheme so as to cause a false and fraudulent judgment to be entered against the Wolks that would impose monetary fines and encumber their property. The Amended Complaint contains allegations that in executing the conspiracy Reilly told the Code Enforcement Board that the Wolks' property was not in compliance with various electrical codes, knowing these statements to be false. In furtherance of the conspiracy, after the initial compliance order had been issued and the Wolks had cured the alleged deficiency Reilly again allegedly filed false affidavits reporting that the violations had not been corrected.

A reasonable investigator would have known that such fraudulent conduct allegedly undertaken by Boston, Reilly, and Frenk would amount to a violation of the Wolks' constitutional rights. Cf. Cruz v. Kauai County, 279 F.3d 1064, 1068 (9th Cir. 2002) ("[A] complaint that an officer knowingly filed a false affidavit to secure an arrest warrant states a claim under § 1983."). The argument that Boston, Reilly, and Frenk are entitled to qualified immunity because they had no power to directly deprive the Wolks of due process or impose fines is unpersuasive. Section 1983 creates a cause of action against every person who, under color of law, causes any citizen to be subject to a deprivation

of constitutional rights. The allegations that the inspectors lied and misled the Code Enforcement Board to deprive the Wolks of property therefore would constitute a sufficient claim under § 1983 if there were indeed a due process flaw in the code enforcement scheme.

The factual allegations in the Amended Complaint relating to Boston, Reilly, and Frenk, along with the attachments identifying exactly which documents are alleged to be false, sufficiently satisfy the heightened pleading requirements for § 1983 claims recognized in GJR Investments, Inc. v. County of Escambia, 132 F.3d 1359, 1367 (11th Cir. 1998). Although the factual allegations against Boston are comparatively limited, he is alleged to have conspired with the other inspectors to carry out a scheme to deprive the Wolks of their rights - a scheme described in detail in the Amended Complaint. Accordingly, the Wolks' claim against Boston also would be sufficient.

The Wolks have also sued Reilly and Frenk's supervisor, Chief Electrical Inspector Fox. The Amended Complaint contains allegations that Steven Wolk and Fox discussed the conduct of Reilly and Frenk. According to the Amended Complaint, Fox ignored the Wolks' allegations, endorsed the misconduct of his subordinates, and told Mr. Wolk that the County would not grant the Wolks an "affidavit of compliance" unless they replaced all electrical panels in the building. In sum, the Wolks contend Fox failed to prevent Reilly and Frenk from using their positions as code inspectors to deprive Plaintiffs of their constitutional rights. In response to their claims, Fox has also raised the defense of qualified immunity.

The timing of Steven Wolk's reports to Fox is significant. According to the Amended Complaint, Steven Wolk reported the allegedly fraudulent conduct of Reilly and Frenk to Fox on April 11 and 14, 1997. This was after Reilly submitted the allegedly false affidavit to the Code Enforcement Board on February 7, 1997 and after the Code Enforcement Board's March 19, 1997 order imposing fines

had been issued and recorded. For a supervisor to be subject to a § 1983 claim, the supervisor must have been alleged to have personally participated in the unconstitutional conduct or to have notice of the violations due to their prevalence and blatancy. As explained by the Eleventh Circuit:

> [Supervisory] liability under section 1983 "must be based on something more than a theory of *respondeat superior*. Supervisory liability occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so."

Dolihite v. Maughon, 74 F.3d 1027, 1052 (11th Cir. 1996) (quoting Cross v. Ala. Dep't of Mental Health & Mental Retardation, 49 F.3d 1490, 1508 (11th Cir. 1995) (quoting Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990)) (alteration and emphasis in original). "A supervisor sued in [his] individual capacity is entitled to qualified immunity unless a reasonable supervisor would have known that his or her actions were unlawful in light of clearly-established law and the information possessed." Id. (citing Greason v. Kemp, 891 F.2d 829, 836-37 (11th Cir. 1990)).

Applying this standard, Fox would be entitled to qualified immunity. The Amended Complaint does not contain allegations that Fox had knowledge that members of his staff had conspired to deprive Plaintiffs of their constitutional rights. Nor does the Amended Complaint contain allegations that Fox knew his subordinates had submitted a false affidavit to the Code Enforcement Board.

At most, Plaintiffs allege that Fox failed to accept and respond to the unsubstantiated, after-the-fact accusations leveled by Steven Wolk. Under the circumstances, Fox's conduct was reasonable, and he would be entitled to the defense of qualified immunity.

Plaintiffs have also sued Orange County Code Enforcement Division Manager Pittman, but Pittman also would benefit from a qualified immunity defense. He is alleged to have provided insufficient training. Specifically, he allegedly failed, with deliberate and reckless indifference to the constitutional rights of Orange County property owners, to put a policy in place that would have required all inspectors to receive training on the limitations posed by the United States Constitution on the actions of code inspectors. (Amended Complaint, Doc. 10 ¶ 78). The allegations against Pittman are also insufficient.

Inadequacy of training may only serve as the basis for § 1983 liability when the need for training is "so obvious" and the failure to train "so likely to result in the violation of constitutional rights" that such failure amounts to a "deliberate indifference" to the rights of citizens. City of Canton v. Harris, 489 U.S. 378, 388-90 (1989). To establish a deliberate indifference, "a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." Gold v. City of Miami, 151 F.3d 1346, 1350 (11th Cir.1998). In the instant case, the Wolks claim that Pittman, with deliberate indifference to the constitutional rights of property owners, failed to establish a training policy addressing the requirements of the Constitution on code inspectors. However, the Amended Complaint does not allege facts indicating that it should have been obvious to Pittman that inspectors were engaged in practices that resulted in violations of property owners' constitutional rights. Accordingly, Pittman is entitled to qualified immunity and the claims against him shall be dismissed.

iii. § 1983 Claim Against Attorney Mantzaris and His Firm

Even if the code enforcement scheme were constitutionally flawed, the Amended Complaint would fail to state a § 1983 cause of action against counsel for the Code Enforcement Board, Mantzaris, and his firm, DDKSMN. These Defendants are merely alleged to have given the Code Enforcement Board members legal advice. This act by private actors of giving legal advice to a client - even if that client is a state actor- does not constitute action "under color of law" as required for a § 1983 cause of action. Cf. Tunheim v. Bowman, 366 F. Supp. 1395, 1398 (D. Nev. 1973) ("Absent a direct interest of the attorney in the litigation, it is only the client who stands to profit from procedures in deprivation of another's civil rights, and it is appropriate that he should be held, in a proper case, to respond in damages. An attorney acting only in a professional capacity cannot be held to judge at his peril with respect to the decision of difficult questions which divide the courts and provoke debate among legal scholars."); cf. also Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (holding, in § 1983 action by suspended basketball coach at state university, that university's actions pursuant to the rules and recommendation of NCAA did not render the NCAA a state actor).

D. Statute of Limitations

As acknowledged by the Wolks and the Orange County Defendants, there is a four-year statute of limitations for § 1983 actions arising in Florida. Burton v. City of Belle Glade, 178 F.3d 1175, 1188 (11th Cir. 1999). This four-year limitations period is borrowed from Section 95.11(3), Florida Statutes, which provides limitations for personal injury suits. Id. The present action was filed on February 2, 2001. Therefore, the critical date four years earlier is February 2, 1997. As set forth by the Fourth Circuit in Bireline v. Seagondollar, 567 F.2d 260 (4th Cir. 1977), the accrual date

of the limitations period is the day that the plaintiff knows or has reason to know of the injury which is the basis of the action.

It is well-settled that "[a] motion to dismiss under [Rule 12(b)(6)] based upon the statute of limitations may be granted, however, only where it is apparent on the face of the complaint that the action is untimely." Griffiths v. Blue Cross & Blue Shield of Ala., 147 F. Supp. 2d 1203, 1221 (N.D. Ala. 2001); accord Ambrose v. Catholic Soc. Servs., Inc., 736 So.2d 146, 149 (Fla. 5th DCA 1999) ("[O]nly under extraordinary circumstances where the facts in the complaint, taken as true, conclusively show that the action is barred by the statute of limitations, should a motion to dismiss on this ground be granted."). Although the Amended Complaint describes some events that took place before February 2, 1997, it is not "apparent on the face of the complaint" that the Wolks' cause of action accrued prior to that date. Therefore, the County Defendants' motion to dismiss is without merit insofar as it is based on statute-of-limitations grounds.

However, a different statute of limitations applies to the estate of Reilly. The Orange County Defendants argue that the claims against Reilly's estate are barred pursuant to Section 733.710(1), Florida Statutes, which states in part that "2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent." Orange County states that Reilly passed away on December 9, 1997, and that claims against Reilly or his estate are thus barred. The Wolks, however, correctly note that the date of Reilly's death was not pled in the Amended Complaint and may not be supplied by unsupported assertions made in moving papers.

E. Punitive Damages

The Defendants have also moved to dismiss the

Wolks' claims for punitive damages.[20] In support of this motion, the Defendants rely on Section 768.72, Florida Statutes, which states in part:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure.

This section is inapplicable to the Wolks' federal Constitutional claims brought pursuant to § 1983. The Eleventh Circuit has expressly held that "the pleading rules set forth in Fed.R.Civ.P. 8{a){3) preempt § 768.72's requirement that a plaintiff must obtain leave from the court before including a prayer for punitive damages." Porter v. Ogden, Newell & Welch, 241 F.3d 1334, 1340 {11th Cir. 2001); accord Bass *ex rel.* Lewis v. Wallenstein, 769 F.2d 1173, 1190 {7th Cir. 1985) {"Nor can restrictive state law preclude the estate's recovery of punitive damages in a case in which the showing of 'recklessness or callous indifference' required by Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 {1983), has been made. 'To disallow punitive damages in Section 1983 actions solely on the basis of restrictive state tort law would seriously hamper the deterrence effect of Section 1983.'") {quoting Bell v. City of Milwaukee, 746 F.2d 1205, 1241 (7th Cir.1984)). In the

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[20]The Orange County Defendants moved to dismiss the claim for punitive damages (Docs. 31 & 32); the Code Enforcement Board Defendants moved to strike it (Doc. 28). In light of the Court's conclusion regarding qualified immunity and claim insufficiency as to the Code Enforcement Board Defendants, their motion to strike the punitive damages claim shall be denied as moot.

instant case, the alleged fraudulent acts of the code inspectors could, if proven, constitute a reckless or callous disregard to the Wolks' constitutional rights. Therefore, the motion to dismiss the punitive damages claim is without merit.

Conclusion

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. The Motion to Dismiss Amended Complaint {Doc. 28) filed by Defendants W. Robert Humble, Joseph Perkins, Ronald Hill, Jimmy Wrye, Mary Kaschai, Fran Wyatt, W. Steven Rodgers, Jim Powers, Beverly Boyer, Joel Hammock, Mark Chernega, Daniel Mantzaris, and Drage, DeBeaubien, Knight, Simmons, Mantzaris & Neal, P.A. {"DDKSMN") is **GRANTED**. The Motion to Strike (Doc. 28) the punitive damages claim against these Defendants is **DENIED as moot**.

2. The Motion to Dismiss Pursuant to Rule 12(b)(6) and Rule 8(a), Federal Rules of Civil Procedure (Doc. 31) filed by Defendants Orange County, Terry Boston, Marlene Reilly, Edward Frenk, Edward Fox, Jr., Melvin Pittman, and George Dorsett is **GRANTED in part** and **DENIED in part**.

3. The Amended Complaint (Doc. 10) is **DISMISSED** in its entirety.

4. All other pending motions are **DENIED as moot**.

5. The Clerk is directed to close the file.

DONE and **ORDERED** in Orlando, Florida this _5th_ day of November, 2002.

s/_____
JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

APPENDIX C

FILED
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
No. 02-16662-GG
FEB 10 2004

STEPHEN WOLK,
HELEN J. WOLK,

THOMAS K. KAHN
CLERK

Plaintiffs-Appellants,

versus

ORANGE COUNTY, FLORIDA
a political subdivision of
the State of Florida,
TERRY W. BOSTON, individually, et al.,

Defendants-Appellees.

ATTORNEY GENERAL OF FLORIDA,

Intervenor,

- - - - - - - - - - - - - - - - - -

On Appeal from the United States District Court for the
Middle District of Florida

- - - - - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, ____F.2d____).

Before: BLACK and HULL, Circuit Judges, and GOLDBERG*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

*Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.